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Supreme Court of the United States

OCTOBER TERM, 1954

No. 250

ANTHONY TONY SICURELLA,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals is reported. (*United States* v. *Sicurella,* 7th Cir., 1954, 213 F. 2d 911). It is printed in the record. [R. 110-115] The opinion of the Court of Appeals in the companion case of *United States* v. *Simmons,* 7th Cir., 1954, 213 F. 2d 901, referred to in the opinion in this case by the Court of Appeals, is printed in the record at pages 77-92, in No. 251, October Term, 1954, a companion case to this one, styled *Simmons* v. *United States.*

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1954. The time for filing petition for writ of certiorari was extended to August 14, 1954. The petition was filed within the extended time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).—See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant

service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or

neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors." —50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the act (50 U. S. C. App. § 462(a), 62 Stat. 622)provides:

". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

Section 1622.14 of the Selective Service Regulations (32 C. F. R. §1622.14 (as amended by E. O. 10420, 17 F. R. 11593, Dec. 19, 1952)) provides:

"*Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (E. O. 10363, 17 F. R. 5456, June 18, 1952)) provides:

"*Special provisions when appeal involves claim that registrant is a conscientious objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in combatant training and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (1951 Rev.)) provides:

"*Decision of appeal board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed

forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; *provided*, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

QUESTIONS PRESENTED

I.

Whether the denial by the appeal board of the claim for classification of petitioner as a conscientious objector was without basis in fact and, consequently, the final I-A classification was arbitrary and capricious.

II.

Whether the act and the regulations permit the Department of Justice to recommend to the appeal board to deny and whether the appeal board may deny the conscientious objector status because the peititioner, an objector to direct participation in the armed forces, is willing to defend himself and his brothers by the use of force.

STATEMENT OF THE CASE

This criminal action was brought by indictment charging petitioner with a violation of the Universal Military Training and Service Act (50 U. S. C. App. §§ 451-470). Petitioner was charged with failing and refusing to submit to induction, contrary to the act. The indictment was filed on April 17, 1953. [R. 1, 2, 5] The petitioner pleaded not guilty on June 2, 1953.

The case proceeded to trial before the Judge without a jury, which was waived. [R. 1-2, 16] At the close of all the evidence the petitioner made his motion for judgment of acquittal. [R. 3, 11-14] The motion for judgment of acquittal was denied. [R. 3, 15-16] On September 23, 1953, the court

found the petitioner guilty and sentenced him to the custody of the Attorney General for a period of two years. [R. 15-16] A notice of appeal was timely filed with the trial court. Statement of points was duly filed in the court below. [R. 106-108] The court below affirmed. [R. 115]

Petitioner was born on June 13, 1927. [R. 51, 53] He registered with his local board on September 11, 1948. [R. 52, 53] The local board mailed to him the classification questionnaire. [R. 54-55] On January 15, 1945, Sicurella returned his questionnaire properly filled out and filed it with the local board. He identified himself by giving his name and address. He then showed that he was a minister of religion. He answered that he regularly served as such. He then said that he had been a minister of Jehovah's Witnesses since 1934. He added that he was formally ordained in January of 1944, in Chicago. [R. 55-56]

He answered that he was a student preparing for the ministry also. [R. 56] In his testimony at the trial he explained that while he was a minister he continued to attend school and study Bible courses so that he could keep up to date. He said this was the reason he answered that he was a student of the ministry. [R. 43]

In the questionnaire Sicurella also showed that he was a clerk for the Railway Express Agency. [R. 56-57] He showed that he worked 44 hours per week in this job. [R. 56-57]

Sicurella showed that he had attended eight years of elementary school. He also attended two years of junior high school and two years of high school, having graduated. [R. 57] Sicurella failed to sign the conscientious objector blank appearing in the questionnaire. [R. 57] At the trial he explained to the court the reason he had failed to sign the conscientious objector blank. He said that he thought that according to law he had to "claim either IV-D or I-O,

so I claimed the more important one to me, of IV-D." [R. 19]

In the conclusion of his classification questionnaire Sicurella claimed classification in Class IV-D, the minister's exemption provided for in the regulations. [R. 58] The local board, on March 1, 1949, recognized his claim for exemption as a minister of religion. The board placed him in Class IV-D. [R. 58] He was notified of this. [R. 58]

On September 20, 1950, the local board notified Sicurella to appear for hearing on September 26, 1950. The memorandum made by the local board on the date he was notified shows that the board wrote to State Headquarters "for law on the Jehovah's Witnesses before the board will act." [R. 58] On October 9, 1950, the local board placed Sicurella in Class I-A. [R. 58] He was notified of this. [R. 58] Sicurella requested a personal appearance on October 16, 1950. [R. 62-63] On the same date he also filed with the local board affidavits and certificates showing that he was pursuing the ministry and that as a basis for his ministerial activity he was entitled to the exemption. [R. 60-62]

On October 17, 1950, Sicurella called the board about the hearing. The local board then, on November 3, 1950, notified him to appear before it with evidence on November 8. [R. 59] On November 8, 1950, Sicurella filed with the local board a list of scriptures showing that he had conscientious objections to war. He also filed petitions and certificates as to his ministerial status. [R. 64-65] On November 8, 1950, the local board classified Sicurella in Class I-A. This made him liable for unlimited military training and service. [R. 59] He was notified of this classification. [R. 59]

Sicurella wrote the board a letter of appeal on November 11, 1953. In this letter of appeal he requested another personal appearance. [R. 66] The local board answered him. They told him he was not entitled to another personal appearance. [R. 67] The board then notified him to report for preinduction physical examination on November 27, 1950. [R. 67-68] He was declared to be physically acceptable for

training and service. [R. 59, 60] He was notified of his acceptability by the local board on December 8, 1950. [R. 59, 70]

On December 10, 1950, Sicurella filed with the local board a letter showing his Scriptural argument and basis for his conscientious objections to combatant and noncombatant military service. [R. 69-70]

On January 17, 1951, the appeal board classed Sicurella for unlimited military training and service in the armed forces. He was placed in Class I-A. [R. 59] The file was returned to the local board and he was notified of this classification. [R. 59] On January 26, 1951, Sicurella requested a personal appearance. He again stated that he was a conscientious objector. [R. 72, 73, 74]

On January 31, 1951, the local board wrote Sicurella and told him that there would be no personal appearance granted to him. [R. 74] On February 5, 1951, Sicurella notified the local board that he was appealing to General Hershey for relief against the actions taken by the board. [R. 75]

On February 9, 1951, Sicurella filed with the local board a conscientious objector form that he had requested on February 5, 1951. [R. 59, 76] In the conscientious objector form he signed Series I(B). In this he certified that he was conscientiously opposed to both combatant and noncombatant military service. [R. 76] Sicurella showed he believed in the Supreme Being. [R. 76] He described the nature of his beliefs as a conscientious objector. He showed that he was in the army of Christ Jesus. He emphasized that the weapons of his warfare were spiritual and not carnal. He told the board that he believed in rendering unto Caesar the things that are Caesar's. He added, however, that he did not believe in rendering unto Caesar the things that belonged to God. [R. 76-77, 81-82] Sicurella showed the local board that he got his conscientious objections from a deep and serious study of the Bible. [R. 77]

Sicurella answered that he relied on the Bible and the Watchtower Bible and Tract Society for religious guidance

and instruction. [R. 77] In answer to the question as to whether he believed in the use of force he stated that he believed in using force only to the extent of defending the Kingdom interests. This included self-defense and the defense of his brothers. He certified that he did not use weapons and if necessary he would retreat when attacked, in order to avoid trouble. [R. 77-82]

Sicurella stated that the behavior and the conduct of his life that consistently demonstrated the depth of his conviction was that he had been preaching the gospel of Jehovah's Witnesses since he was six years old. He indicated that he preached publicly and from house to house. He otherwise showed that he had pursued a consistent course of action as one of Jehovah's Witnesses since childhood. [R. 77-78]

Sicurella showed that he had publicly expressed his stand as a Christian minister and as a conscientious objector when he was baptized. He indicated that from the Bible he believed that the kingdom of Almighty God was not of this world. He showed that he must maintain strict neutrality and that he had expressed himself on this view. [R. 78, 82]

Sicurella then listed the schools he had attended, the jobs at which he had been employed, and the addresses of the places where he had lived. [R. 78-79] He showed that his parents were Jehovah's Witnesses. [R. 79] He answered that he had never been a part of any military organization. [R. 79]

Sicurella showed that he was a member of a religious organization. He showed that this was Jehovah's Witnesses and that the legal governing body of that group was the Watchtower Bible and Tract Society. He answered that he had been brought up in the faith of Jehovah's Witnesses. He showed the address of his church and named the presiding minister. [R 80] He described the creed of Jehovah's Witnesses in opposition to participation in war. He showed that they believed that the kingdom of Almighty God was not of this world. He certified that they were neutral to

the conflicts of this world. [R. 80] He said that he was an ordained minister of religion, preaching the gospel of God's kingdom. [R. 80]

Sicurella concluded his conscientious objector form by giving references to persons who would vouch for his sincerity. He then signed the form. [R. 80-81]

When the conscientious objector form was filed with the local board the local board did not reopen his case and reconsider it, as required by law. On February 16, 1951, the board forwarded the file to the State Director for his review. [R. 59] On February 21, 1951, the State Director wrote the local board that it should reopen and reconsider his case. He also informed the board that it would be necessary to consider the claim of Sicurella as a minister of religion and as a conscientious objector. [R. 83-84]

On reopening and reconsidering his case the local board classed Sicurella in Class IV-D. This exempted him for the second time as a minister of religion. This was on March 12, 1951. [R. 59] He was notified of this classification. [R. 59]

Sicurella stayed in this exempt status until March, 1952. On March 10, 1952, the local board forwarded his file to the State Headquarters for review. [R. 59, 84-85] The State Headquarters reviewed his file and advised the board that in the opinion of the State Director Sicurella did not qualify for the ministerial exemption or Class IV-D. [R. 85-86] Then on March 17 the local board classified him in Class I-A, and he was later notified of this classification. [R. 59]

On March 24 Sicurella wrote a letter to the local board requesting a personal appearance. [R. 59, 86-87] The local board then notified him to appear before it on April 7. [R. 59, 87] On April 7, following personal appearance, the local board classified Sicurella again as liable for unlimited military service. He was placed in Class I-A. He was then notified of this classification. [R. 59]

Sicurella then took an appeal to the appeal board on April 18, 1952. [R. 59, 88-89] On that date his file was forwarded to the appeal board. [R. 59, 89] The appeal board

then placed Sicurella in Class I-A on May 21, 1952. [R. 59, 90] The file was returned to the local board and Sicurella was notified of the I-A classification by the appeal board on May 23, 1952. [R. 59]

The State Director was written a letter dated May 31, 1952, by Sicurella. He complained of the action by the appeal board. He charged that he had been illegally dealt with by the boards. [R. 90-91] The State Director wrote Sicurella that it was up to the local board to classify him. [R. 92] The file was called in to State Headquarters, however, by the State Director for study and review. [R. 60, 93-94]

The State Director then wrote a letter to the local board calling attention to the fact that Sicurella's procedural rights on personal appearance had been violated by the board. [R. 94-95]

The local board wrote Sicurella to appear before it on July 14, 1952. [R. 60, 95-96] Sicurella appeared before the local board on July 14. [R. 60] The personal appearance was very summary in nature. It was brief. Very few questions were asked. An extremely short memorandum of the personal appearance was made by the local board. The testimony showed that one of the board members stated to Sicurella that they knew he was a minister of religion but that they were not able to classify him as a minister because it was over their head. Apparently the board member was referring to the earlier letter from the State Director giving the opinion that Sicurella was not entitled to the minister's exemption. [R. 24]

The trial court excluded testimony offered by the petitioner to show prejudice of the board members against Jehovah's Witnesses and a denial of the claim for exemption by determining on a class basis that Jehovah's Witnesses are not ministers rather than considering *de novo* the particular claim of Sicurella. Offers of proof were made showing what the testimony would have been had it been admitted. [R. 22-23, 46-47, 49-50]

The memorandum made by the local board following the personal appearance merely showed that Sicurella was ordained in February of 1943 by his congregation. It stated that he held services in the church twice a month and referred to the basis for the claim for classification as a minister of religion. [R. 96]

The local board, following the personal appearance on July 14, 1952, classified Sicurella in Class I-A. It notified him of the classification. [R. 60] Then on July 21, 1952, Sicurella appealed his classification. [R. 97] There was an FBI investigation on his claim for classification as a conscientious objector. This investigation preceded a hearing in the Department of Justice before the hearing officer. The hearing officer notified Sicurella to appear before him on January 13, 1953, for a hearing. [R. 26] Sicurella appeared for the hearing as notified by the officer. [R. 26] He brought along with him to the hearing twelve witnesses to vouch for his sincerity and good faith in making his claim for classification as a conscientious objector. [R. 26]

At the personal appearance before the hearing officer Sicurella asked the hearing officer for the FBI report. The hearing officer said that there was no use in showing it to him, because it was favorable to Sicurella. [R. 26] Sicurella then asked the hearing officer, Roy West, to please give him a summary of the unfavorable evidence in the FBI report. The hearing officer then replied: "There is no use in telling you because it was favorable." [R. 26] At the close of the hearing Hearing Officer West told Sicurella that he believed he was a sincere conscientious objector. He stated that he would recommend favorably to the Department of Justice and suggest that Sicurella be classified as a conscientious objector. [R. 27]

The file and the report of the hearing officer were sent in to the Department of Justice at Washington. The Assistant Attorney General reviewed the case and the report of the hearing officer. [R. 99-101] The Assistant Attorney General, after stating the history of Sicurella's case, referred to the

recommendation of the hearing officer. He said that the hearing officer was convinced that Sicurella was sincere and that his conscientious objections were based on religious training and belief. He stated that the hearing officer recommended the conscientious objector classification to be given to Sicurella. [R. 100-101]

The Assistant Attorney General did not follow the recommendation of the hearing officer. He did not reject the report of the hearing officer because Sicurella was not sincere. The Assistant Attorney General recognized that Sicurella was sincere. He recommended against Sicurella because he "failed to establish that he is opposed to war in any form." The Assistant Attorney General noted that Sicurella would defend himself, his ministry and his fellow brothers. The Assistant Attorney General held that because Sicurella would exercise his legal and Biblical right of self-defense he was not entitled to the conscientious objector exemption "within the meaning of the act." [R. 101] The Assistant Attorney General then recommended to the appeal board that the claim for classification as a conscientious objector "be not sustained." [R. 101]

On February 10, 1953, the appeal board classified Sicurella in Class I-A. [R. 101-102] The file was returned to the local board and Sicurella was notified of the classification that made him liable for military training and service and denied his claim for exemption. [R. 60] On February 19, 1953, Sicurella was ordered to report for induction on March 5, 1953. [R. 60, 102-103] He reported on that date but refused to submit to induction. [R. 54, 104-105, 106]

The documentary evidence showed that Sicurella was conscientiously opposed to both combatant and noncombatant military service. [R. 76-83, 99-101]

Under ground 8 of the motion for judgment of acquittal the petitioner complained of the denial of the conscientious

objector status as being without basis in fact. [R. 12] The motion for judgment of acquittal was denied. [R. 3, 15-16] The Court of Appeals held that there was basis in fact for the denial of the conscientious objector status. [R. 115]

The Department of Justice recommended to the appeal board that Sicurella be denied the conscientious objector status because he was willing to fight in self-defense. [R. 99-100, 101] In accordance with that recommendation the appeal board rejected the conscientious objector claim. It classified petitioner I-A. [R. 101-102]

Under ground 9 of the motion for judgment of acquittal it was contended that the recommendation was irrelevant and illegal. [R. 12] The motion for judgment of acquittal was denied. [R. 3, 15-16] The Court of Appeals held that the recommendation was not illegal. [R. 113-114]

SUMMARY OF ARGUMENT

ONE

The final denial of the conscientious objector status by the appeal board was without basis in fact; consequently, the final I-A classification by the board is arbitrary, capricious and contrary to law.

Petitioner brought himself squarely within Section 6(j) of the act and Section 1622.14 of the Selective Service Regulations. *Dickinson* v. *United States*, 346 U. S. 389, 396-397, 399 (1953), required that the board ". . . must find and record affirmative evidence that he has misrepresented his case." The documentary evidence submitted by petitioner was undisputed and showed that he was a conscientious objector to the performance of both combatant and noncombatant military service.

At no time did any board member of the Selective Service System or the hearing officer of the Department of Justice challenge the veracity or the sincerity of petitioner. All found him to be sincere. No question of fact was raised by

any governmental agent in this case while it was in the Selective Service System. The absence of contradictory evidence or impeachment of the petitioner makes necessary the application of the rule of *Dickinson* v. *United States, supra.*—*Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815, 822-823; *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331-332; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368, 369-370; *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93, 96; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772; *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 900; *United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 446.

The above decisions cannot be distinguished. The answers given by the appellants in those cases are the same as the answers made by the petitioner in this case. Certain speculations were urged by the Government as basis in fact in those cases. These were discussed. The discussion of such speculations does not distinguish those cases. The factual situation and the holding of the courts (that there was no basis in fact) make the cases directly in point here. They are applicable and cannot be set aside.

Petitioner had been one of Jehovah's Witnesses and possessed conscientious objections for years before he was finally classified. He filed his conscientious objector claim late. He had reasons for the late filing of his claim. The board permitted it. It considered the conscientious objector form even though it was filed late. The late filing of the form cannot be raised in this Court as basis in fact, since the Selective Service System did not rely upon the point.

The Selective Service System provides for the making of the conscientious objector claim even without the filing of the form. See Local Board Memorandum No. 41, November 30, 1951, amended August 15, 1952. The state director ordered the local board to reopen petitioner's case because of such filing of the conscientious objector form. There cannot be a waiver of the claim because of the late filing of the form. Unless the Selective Service System bars petitioner

from filing the form it is beyond the competency of the Government to urge for the first time that the form was filed late. In any event the late filing of the form cannot be basis in fact. The facts are undisputed notwithstanding the fact that the form was filed late. There was, therefore, no basis in fact for the denial of the claim because of the late filing of the form. It was not considered by the Selective Service System as basis in fact and the undisputed evidence otherwise established that petitioner was exempt from military training and service.

Omissions in the answers appearing in the conscientious objector form cannot be relied upon as basis in fact. Registrants are not to be treated as though they were litigants represented by counsel. (*Berman* v. *Craig*, 3rd Cir., 1953, 207 F. 2d 888, 891) Section 1626.13 and Section 1626.24 of the regulations provide for the procedure to be followed in the event the forms are incomplete. Failure of the boards to resort to these regulations gives the Government no basis to argue that the failure to fill out the form completely and in every respect is basis in fact for the denial of the conscientious objector status. The Department of Justice found that Sicurella was sincere. The hearing officer specifically declared him to be sincere. The Assistant Attorney General did not contradict this finding. The Department of Justice merely recommended that because of the belief in self-defense the conscientious objector status should be denied. This recommendation was not a contradiction of the undisputed evidence. It did not constitute a challenge to the sincerity of Sicurella.

The refusal of Sicurella to perform civilian work because he claimed exemption as a minister, while it may be a defiance of "all secular authority," does not constitute basis in fact for the denial of the conscientious objector status. The Department of Justice did not rely upon this position in its recommendation. The holding of the court below, based upon the refusal of Sicurella to do civilian work, is speculation that flies in the teeth of *Pickinson* v.

United States, 346 U. S. 389 (1953). It is guesswork to the extreme that the board denied the conscientious objector status because of this position of Sicurella.

The court below, in holding that the refusal to perform civilian work was a basis in fact for the denial of the conscientious objector status, ignores the separation of authority between the draft boards and the courts. The draft boards are to classify; they may not penalize. It is for the district courts to punish for violations of the act. A mere statement of refusal to comply with the order is not basis in fact for the denial of the conscientious objector status.

Draft boards must properly classify according to the facts. They must then order a conscientious objector to do civilian work. If, as and when the conscientious objector refuses to do work when properly ordered he may be prosecuted. His statement, in advance of an order commanding him to perform civilian work, that he will not perform the work, being a mere threat, does not constitute a waiver or abandonment of the claim. The conscientious objector must answer the truth according to the selective service forms. While he may refuse to do work ordered for him his refusal does not constitute a withdrawal or a contradiction of the statements appearing in his conscientious objector form. The position taken here is sustained by *Franks* v. *United States*, 9th Cir., Oct. 4, 1954, — F. 2d —; compare *United States* v. *Liberato*, W. D. Pa., 1953, 109 F. Supp. 588, 589.

The statement of refusal to perform civilian work as being no basis in fact is supported by the Congressional history of the act.—See Senate Report No. 1268, 80th Congress, 2d Session, May 12, 1948, to accompany Senate Bill No. 2655, *infra*, this brief, p. 38. See also the Conference Report on Selective Service Act of 1948, Report No. 2438, House of Representatives, 80th Congress, 2d Session, dated June 19, 1948, to accompany Senate Bill No. 2655, *infra*, p. 38. See also the Report by Armed Services Committee, House of Representatives, No. 535, 82nd Congress, 1st Session, dated May 31, 1951, to accompany Senate Bill No.

1, *infra*, p. 39. It is clear from these reports that Congress rejected the thought that a conscientious objector could be taken out of his proper status by refusing to do work assigned to him. Congress intended that the conscientious objector be prosecuted for refusal to do civilian work rather than be penalized by the board through the withdrawal of the conscientious objector status.

There is nothing in the act or the regulations that authorizes a procedure for conscientious objectors different from that permitted in cases where the ministerial claim is involved. The conscientious objector claim is not a subjective claim. It is objective. It can be established in the same way that the ministerial claim is established. There is no broader room for speculation in the case of conscientious objectors than there is in the classification of ministers. *United States* v. *Simmons*, 7th Cir., 1954, 213 F. 2d 901; and *White* v. *United States*, 9th Cir., Sept. 14, 1954, — F. 2d —, to the contrary, are erroneous.

The use of the word "conscientiously" does not confer unlimited powers upon the draft boards. This word is not a vague and indefinite dragnet. It merely means that if a man is not a faker, is not falsely impersonating or is not lying about his claim he is "conscientiously" opposed. It merely means, does he really and genuinely oppose participation in combatant and noncombatant service? If the interpretation of the statute contended by the Government is accepted, then it will be impossible for a court ever to say that there is no basis in fact in a conscientious objector case where the boards have denied the claim in the face of undisputed evidence. In every classification of a conscientious objector that is always involved: the interpretation of the word "conscientiously."

Petitioner did not appear before the appeal board. The appeal board was the board that made the final classification. That board is in no better position to determine the question of whether petitioner is "conscientiously" opposed to war than is this Court. The appeal board had nothing but the

papers before it. These papers showed indisputably that petitioner was a conscientious objector. The denial of the claim was without basis in fact.

TWO

The act and the regulations do not permit the Department of Justice to recommend to the appeal board that willingness of petitioner to defend himself and his brothers is basis in fact for the denial of the conscientious objector status.

The Assistant Attorney General recommended that petitioner be denied the conscientious objector claim because of belief in self-defense. This recommendation is illegal. Self-defense is no basis under the statute or the regulations for denying the conscientious objector claim. The decision of the court below was judicial legislation. It added to the words of Congress. It constitutes a repeal of the conscientious objector exemption from military service.

If self-defense is a basis in fact for the denial of the full conscientious objector status (opposition to noncombatant as well as combatant service) then a soldier conscientious objector, willing to wear a uniform and do hospital work, may likewise be denied his conscientious objector status. Surely Congress did not intend to deny the I-A-O classification to the conscientious objector willing to perform noncombatant military service because he is willing to defend himself. Since that type of conscientious objector cannot be denied the claim because of self-defense, then by force of the same reason the full conscientious objector cannot be deprived of his rights under the act.

The only limitation Congress placed on the definition of a conscientious objector in Section 6(j) of the act was that the beliefs be not political, sociological or philosophical. Had Congress intended to deny the person willing to defend himself the conscientious objector status it would have said so. Self-defense is the law of God, the law of nature and the law of the land. Congress knew this inherent right

of man. It certainly did not intend it to be used as the basis for the denial of the conscientious objector status. It is judicial legislation of the rankest sort to hold that Congress intended such a result. Such cannot be imputed to Congress in the absence of something explicit in the act.

It is unreasonable to assume that Congress intended that the conscientious objector should be required to agree to the destruction of his own life in order to be granted the exemption from military service as a conscientious objector. It is beyond the prerogative of the Government to read into the law something that Congress did not say or intend to say. The Department of Justice and the court below have taken a position that is inconsistent with that taken by the Department of Justice in other cases. The Assistant Attorney General in charge of the recommendations throughout the United States in conscientious objector cases has, since the recommendation in this case, retreated from the position that self-defense is basis in fact for the denial of the conscientious objector status. The Department of Justice has sent out a memorandum to all hearing officers of the Department throughout the country that self-defense is no longer considered to be basis in fact for the denial of the conscientious objector status. The Solicitor General of the United States before this Court in *Taffs* v. *United States*, No. 576, October Term, 1953, also declared he did not seek review of the holding of the court below that the willingness of Jehovah's Witnesses to defend themselves does not exclude them from the classification as conscientious objectors.

The decision of the court below is in direct conflict with *Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689, 691-692; *United States* v. *Pekarski*, 2d Cir., 1953, 207 F. 2d 930; *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329, 331; *United States* v. *Hartman*, 2d Cir., 1954, 209 F. 2d 366, 369-370; *Jessen* v. *United States*, 10th Cir., 1954, 212 F. 2d 897 *Hinkle* v. *United States*, 9th Cir., Sept. 24, 1954, —F. 2d —;

compare what Mr. Justice Douglas said in *Clark* v. *United States,* 74 S. Ct. 357, 98 L. Ed. 171 (Dec. 10, 1953).

The recommendation of the Department of Justice, rejecting the report of the hearing officer and recommending that petitioner be denied the conscientious objector status because of his belief in self-defense, became a vital link in the proceedings. (*United States* v. *Everngam,* D. W. Va., 1951, 102 F. Supp. 128; *Hinkle* v. *United States,* 9th Cir., Sept. 24, 1954, — F. 2d —) The chain is no stronger than its weakest link. This defect in the chain of proceedings destroys the classification of the appeal board.

The construction placed upon the act by the Department of Justice (that the conscientious objector status be denied to one willing to defend himself) is discriminatory. The interpretation places reasonable doubt upon the validity of the law as enforced. Since this construction gives rise to grave and doubtful constitutional questions it ought to be avoided by adopting a construction that does not discriminate because of the belief in self-defense. The recommendation of the Department of Justice to the appeal board destroyed the appeal board's classification upon which the order to report for induction is based.

ARGUMENT

ONE

The final denial of the conscientious objector status by the appeal board was without basis in fact; consequently, the final I-A classification by the board is arbitrary, capricious and contrary to law.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 75, 83, 86) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious

> training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (amended by E. O. 10420, 17 F. R. 11593, Dec. 19, 1952)) provides:

> *"Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* —(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The entire approach of the court below to whether there was no basis in fact for the appeal board classification is grounded upon error. To begin with, it ignores the doctrine of *Dickinson* v. *United States*, 346 U. S. 389 (1953). That decision requires that the board ". . . must find and record affirmative evidence that he has misrepresented his case. . . ."—346 U. S., pp. 396-397, 399 (dissenting opinion).

Congress says that a man is a conscientious objector if he (1) believes in the Supreme Being, (2) conscientiously opposes participation in the armed forces by combatant and noncombatant service, and (3) bases such objection on religious training and belief. The petitioner concededly believed in the Supreme Being. He concededly opposed participation in the armed forces. He based those objections

on his religious training and belief. Since the statute failed to specify any length of time for the religious training it is speculation and irrelevant to say that it was not long enough. Length of religious training is immaterial under both the act and the regulations.

The documentary evidence submitted by the petitioner establishes that he had sincere and deep-seated conscientious objections against his participation in combatant and noncombatant military service that were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal moral code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is no question whatever on the veracity of the petitioner. The local board accepted his testimony. Neither the local board nor the appeal board raised any question as to his veracity. The question is not one of fact but is one of law. The law and the facts irrefutably establish that petitioner is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing petitioner's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove petitioner was a conscientious objector opposed to both combatant and noncombatant military service) arbitrary, capricious and without basis in fact?

The undisputed documentary evidence in the file before the appeal board showed that the petitioner was conscientiously opposed to participation in combatant and noncom-

batant military service. This showing brought him squarely within the statute and the regulation providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

It has been held by many courts of appeals that the rule laid down in *Dickinson* v. *United States,* 346 U. S. 389, 396-397, 399 (1953), (holding that if there is no contradiction of the documentary evidence showing exemption as a minister there is no basis in fact for the classification) also applies in cases involving claims for classification as conscientious objectors.—*Weaver* v. *United States,* 8th Cir., 1954, 210 F. 2d 815, 822-823; *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331-332; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368, 369-370; *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93, 96; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772; *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 802, 804-805; *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 900; *United States* v. *Close,* 7th Cir., 1954, 215 F. 2d 439, 441-442; *United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443, 446; *contra United States* v. *Simmons,* 7th Cir., 1954, 213 F. 2d 901 (No. 251, October Term, 1954).

In *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897, 900, after quoting from *Dickinson* v. *United States,* 346 U. S. 389, 396, the court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of ap-

peals. In those cases the appellants, like petitioner here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government, which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. For instance, see *Jessen* where the Tenth Circuit (after following *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329) said:

> "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."—212 F. 2d, p. 899.

The holdings of other circuits with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., 1953, 207 F. 2d 930; *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93; *Jessen* v. *United States,* 10th Cir., 1954, 212 F. 2d 897; *United States* v. *Close,* 7th Cir., 1954, 215 F. 2d 439; *United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443. And these cases ought not to be pushed aside on the specious but factitious ground that because the courts in some of those cases discussed the speculations urged on the courts as basis in fact the cases are different. They are not different, because on the question of whether there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were the opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case in so

far as the statements in the draft board record showing conscientious objection are concerned.

The court below did not rely upon it, but mentioned that Sicurella was late in making the conscientious objector claim. The situation here is entirely different from the case of a man who was not a conscientious objector at the time he registered. Here there is no situation of a man suddenly becoming a conscientious objector as his draft board case is progressing to the point of induction. The record undisputably shows that Sicurella was a conscientious objector for many years before he registered. His only default was his failure to file the claim. He gave very good and valid reasons for failing to sign the conscientious objector claim and filed a special form for conscientious objector.

He said that he did not know that he was authorized to make the conscientious objector claim, because of his putting in the ministerial claim. He thought that he had to make the ministerial claim first and that if he lost on that, then put in the claim for classification as a conscientious objector. This is his testimony as appears from the record. See the testimony. [R. 19, 69-70, 72, 73, 74]

The situation with Sicurella at the time he made out his questionnaire (in which he failed to indicate that he was a conscientious objector) is similar to that of a married man with a child who neglects to state the facts in his questionnaire. Suppose Sicurella were married and had a child at the time he filled out his questionnaire. Until recently this would have deferred him. Assume that he had made a mistake about whether to claim such deferment at first and that he waited until the last when he failed on his ministerial claim. Then he made the claim for classification as a father. Such delay would not affect his claim for exemption as a father. Suppose a judge, congressman, or other officer deferred from service by law fails to indicate that in his questionaire and relies on his exemption as a father, which is taken away by law, making fathers liable for the draft. Surely when the change of classification from that of a

father to the I-A is made the judge or congressman can go in and claim his status as an official deferred by law. So also Sicurella is entitled to make his conscientious objector claim known at a late date.

This is especially true when there is no evidence of fraud on his part. He concluded in good faith that he could not make the conscientious objector claim simultaneously with the ministerial claim.

Sicurella had a very good reason for not signing the conscientious objector blank at the time he made out the questionnaire. He erroneously thought that it was necessary for him to press first the minister's exemption. There was reasonable basis for this erroneous belief. This flowed from the activities of the FBI, under an order of the Attorney General in interviewing Jehovah's Witnesses pursuant to the FBI investigation under Section 6(j) of the act.—See Circular No. 3461, September 28, 1943, of the Attorney General.

In several cases decided by the courts it has been held that the activities of the FBI in informing Jehovah's Witnesses seeking ministerial exemption that it would be better to give up or not press the conscientious objector claim because they could not test the two simultaneously are illegal.

Under the ordinary practice in the Selective Service System it is not required that a registrant sign Series XIV of the classification questionnaire in order to be entitled to claim the conscientious objector classification. In Local Board Memorandum No. 41, issued November 30, 1951, and amended August 15, 1952, the National Headquarters of Selective Service System notified the local boards that the conscientious objector claim should be considered regardless of how it was presented to the board. The memorandum says, among other things:

> "2. *What constitutes a claim of conscientious objection.*—A registrant should be considered to have claimed conscientious objection to war if he

> has signed Series XIV of the Classification Questionnaire (SSS Form No. 100), if he has filed a Special Form for Conscientious Objector (SSS Form No. 150), or if he has filed any other written statement claiming that he is a conscientious objector."—Local Board Memorandum No. 41, National Headquarters, Selective Service System, Washington, Nov. 30, 1951, amended Aug. 15, 1952.

On February 23, 1951, the State Director of Illinois ordered the local board to reopen and reconsider the case because of the filing of the conscientious objector form. [R. 83-84] What proof of a waiver by the Selective Service System of the late filing could be stronger than this administrative order made by the State Director?

It is reasonable, therefore, to conclude that the late filing of the conscientious objector claim cannot be considered as a waiver of the right to make the claim. Since the Selective Service System did not bar Sicurella from making the claim it is beyond the competency of the courts to say that the claim was filed illegally, out of time. The claim must be considered as having been timely filed since the Selective Service System did not hold that it was filed out of time.

The Government may rely upon *United States* v. *Dal Santo,* 7th Cir., 1953, 205 F. 2d 429, as authority for the affirmance of this case. The *Dal Santo* case is not in point. While in both cases the registrant was late in filing his conscientious objector claim, in the *Dal Santo* case the hearing officer recommended that Dal Santo was not sincere because he was a late-comer to Jehovah's Witnesses. Here the hearing officer did not rely upon the late filing of the conscientious objector form. He found Sicurella to be a sincere conscientious objector, notwithstanding the late filing of the form. The *Dal Santo* case is not in point; it does not control here.

It may not be argued that omissions in the conscientious

objector form would be basis in fact for the denial of the conscientious objector classification. This would not *per se* give basis in fact for the denial of the conscientious objector status unless the uncompleted part of the form was on some vital or crucial point. For instance, if the registrant neglected to give references or to fill out the portion as to his employment or residences, certainly this would not supply basis in fact for the denial of the conscientious objector claim.

Before a claim can be denied because of an incomplete form it must be shown that the draft board or the Department of Justice made an issue of it and relied on the incompleteness as a basis for the denial of the classification. It cannot be resorted to for the first time in the courts as a basis in fact. This would be speculation. It would be treating the registrant as though he were being dealt with as a litigant represented by a lawyer. In *Berman* v. *Craig*, 3rd Cir., 1953, 207 F. 2d 888, 891, it was held:

> "Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel."

See Section 1626.13 and 1626.24 of the Selective Service Regulations, which show that if the appeal board finds that anything is incomplete it shall return the file to the local board and that the local board is required to check the file carefully before sending it to the appeal board to see that "the record is complete."

A registrant is entitled to have his case in court considered so that the same issues that were taken up before the draft board will be passed on in the courts. The only place that the registrant has to complete the forms is before the draft board. He cannot have a trial *de novo* in the district court. (*Cox* v. *United States*, 332 U. S. 442 (1947)) Since there is no right of trial *de novo* and the papers are to be reviewed to determine the question, the courts ought not to be technical in dealing with the registrant, who is

not entitled to correct any errors that may be discovered for the first time in the courts.

The Assistant Attorney General conceded that Sicurella was sincere. The statement by the Assistant Attorney General did not dispute the documentary evidence showing that Sicurella was a conscientious objector or the report of the hearing officer that recommended that Sicurella be given the conscientious objector classification (I-O). [R. 101] The absence of an explicit statement by the Assistant Attorney General that Sicurella was not sincere and the statement that he was sincere as a conscientious objector but that the only reason his claim was being rejected was that of his belief in self-defense, proved clearly that it was entirely proper to conclude the record shows that Sicurella was sincere and conscientiously opposed to war.

The court below held that petitioner defied all secular authority by stating his refusal to do civilian work and, therefore, he should be denied the conscientious objector status. This was solely because he stated that he was opposed to doing civilian work. Regardless of his statement of his opposition the hearing officer of the Department of Justice recommended that he be classified as a conscientious objector. It is to be noted that the Assistant Attorney General did not rely upon this statement as any basis for the denial of the conscientious objector status.

The holding made by the court below at this late date is highly speculative. It flies in the teeth of the decision of this Court in *Dickinson* v. *United States*, 346 U. S. 389, 396-397, since there is no reason stated in the papers except the reasons given by the Assistant Attorney General in his recommendation to the appeal board for the classification denying the conscientious objector status. It is entirely unfair and guesswork of the grossest sort to contend that this may have been a basis in fact. The courts are not permitted to indulge in speculation and say what may or may not have been basis in fact. It is the duty of the courts to search the records for affirmative evidence that contradicts

the claim. The statement made by Sicurella that he was opposed to doing civilian work does not in any sense of the word mean that he is not a conscientious objector.

It should be noted that nowhere in the record did the petitioner state that he was not a conscientious objector. The record shows to the contrary. It is true that he was also seeking, without merit, the exemption given to ministers of religion under the law. But the fact that he relied on his arguments and insisted on the groundless claim for the ministerial exemption as a basis for stating his refusal to do civilian work did not warrant the denial of the conscientious objector status.

The first and main fallacy of the holding of the court below is that it ignores the fact that the jurisdiction of the draft boards is limited to classification and issuance of orders for participation in service based on classification. The boards do not have the authority to penalize a registrant or make a determination that flies in the teeth of the facts of record, just because the registrant says he will not accept the service or work obliged by the classification. That a registrant declares he will not accept the work or service ordered by the board is no basis in fact to the board or authority for it to say that he is not a conscientious objector. His objections may go farther than the law allows and be conscientious. His penalty is punishment for refusal to do work, not to be ordered into the armed forces. That he has objections to the performance of the work does not spell that he is not a genuine conscientious objector. It does not mean that he can be classed as liable for military service. It merely means that as a genuine conscientious objector he objects to the work assigned to him. His objection to the work assignment and refusal to do it does not contradict what he said in his papers about being a conscientious objector. It is no basis for the denial of the claim.

It is the responsibility of the draft boards to classify registrants according to their papers appearing in the files.

The papers submitted by Sicurella showed that he was a conscientious objector. He met the statute in every sense of the word. The mere fact that he stated that he was opposed to doing service that conscientious objectors are ordered to do is no ground for denying the conscientious objector status.

The draft boards are classification boards. They are not authorized to enforce the draft law by penalizing registrants. The courts are the only ones that are permitted to administer sanctions under the law. Even the courts must follow the law. The draft boards, also, must follow the law. A man cannot be denied a classification that he is properly entitled to purely because he states that he is opposed to the service required of registrants in that classification. It is the duty of the draft boards to classify the registrants. It is the responsibility of the registrants to comply with the classification order given by the board unless there is some defect in the proceedings. If there is a defect in the proceeding it is the responsibility of the courts to refuse to enforce the order of the draft boards regardless of their belief that the registrant is not entitled to claim a classification where he opposes the service required by that classification.

The speciousness of the argument of the Government can best be demonstrated in this analogy. Suppose the law required a redheaded man to do work as a conscientious objector of an alternate civilian nature and a blackheaded man to do service in the armed forces. Purely because the redheaded man declared that he was opposed to the performance of civilian work would not justify the board in finding that he was not redheaded. So, also, purely because a conscientious objector states that he is opposed to performing civilian work does not at all give basis in fact for the denial of the conscientious objector status. The draft board, therefore, must properly classify the conscientious objector as a conscientious objector. It must then order him to do work as a conscientious objector. If, as and when he refuses to do proper work that he has been ordered to do as

a conscientious objector he can be prosecuted. Unless and until he has been legally and properly classified first by the local board he cannot be penalized by being given some erroneous classification and then having the board say the other classification to which he is entitled is forfeited because he opposes the work required by that classification. Such factitious type of argument and holding ought not to be accepted by this Court. It results in a complete undermining of the entire doctrine of "no basis in fact" laid down by this Court in *Estep* v. *United States*, 327 U. S. 114, 122-123 and *Dickinson* v. *United States*, 346 U. S. 389, 394, 396-397 (1953). This same argument was made in *Pine* v. *United States*, 4th Cir., 1954, 212 F. 2d 93; and in *Jewell* v. *United States*, 6th Cir., 1953, 208 F. 2d 770, and rejected. The answer to this type of argument is that it is for the local boards to classify. The local boards cannot penalize. A conscientious objector must answer the truth according to the selective service forms sent to him. He may oppose the civilian work and state he will refuse to do it. This does not mean he is not a conscientious objector.

This same contention was sustained by the Court of Appeals for the Ninth Circuit, in *Franks* v. *United States*, No. 14114, decided by that court on October 4, 1954. There, the court said, among other things:

> "We are not unaware of the high probability that Franks, had he been classified 1-A-O, would nevertheless have refused induction and ultimately found himself indicted in much the same manner as has happened here. Perhaps the local board and the hearing officer and the appeal board also had the feeling that they might as well classify the appellant as 1-A for the reason that like other Jehovah's Witnesses he would probably refuse induction as a 1-A-O.
>
> "It is our view, however, that it was not for the local board, any more than it is for this court,

to say that the registrant should not be placed in a certain classification merely because he did not want that classification or was seeking a lower class or would probably refuse to acquiesce in such a classification. ([Footnote 2:] It cannot be demonstrated to a certainty that this registrant would not have changed his mind and accepted a I-A-O classification when he found that that was the best he could do.) At the time of the local board's classification, the Regulations Title 32, Sec. 1623.2, provided as follows:

"'Upon undertaking to classify any registrant, unless grounds are established to place the registrant in Class I-C under the provisions of Sec. 1622.7 of this chapter, the registrant shall be classified in the lowest class for which he is determined to be eligible with Class I-A considered the highest class and Class V-A considered the lowest class according to the following table: . . .' (In the table Class I-A-O is listed below Class I-A). ([Footnote 3:] The same numbered regulation in effect at the time the appeal board classified registrant was substantially similar.)

"If some doctrine of waiver by the registrant were to be applied by the local board, then the mere fact that the registrant was claiming a lower classification than he was entitled to, could be used as a basis for classifying any registrant I-A. In *Cox* v. *Wedemeyer*, 9 cir., 192 F. 2d 920, we rejected and disapproved a similar suggestion in respect to classifications by an appeal board. ([Footnote 4:] *Pine* v. *United States*, 4 cir., 212 F. 2d 93, 98, in citing *Cox* v. *Wedemeyer*, *supra*, also refers to Local Board Memorandum No. 41, to the same general effect. Cf. *Clementino* v. *United States*, 9 cir., — F. 2d —, (decided September

27, 1954.))"—*Franks* v. *United States*, 9th Cir., Oct. 4, 1954, — F. 2d —.

In *United States* v. *Liberato*, W. D. Pa., 1953, 109 F. Supp. 588, 589, it was held that a registrant could not be ordered inducted into the military service because he stated to the board that he wanted the opportunity to decide whether he could accept the work selected by the board. The same principle applies here. The status of petitioner as a conscientious objector still remained, notwithstanding his statement that he would not accept the civilian work.

The only legal authority that the board had was to classify the petitioner properly on the state of the record. If he was not entitled to the minister's exemption then he should have been placed in the conscientious objector status regardless of his statement. He could then have been ordered to do civilian work on a proper classification. Had he then refused to comply with the legal classification and was ordered to do civilian work he could have been prosecuted for failing to do civilian work. It is just as much a violation of the law to refuse to do civilian work as it is to refuse to do military service.

The sum and substance of the answer to the holding of the court below is that the courts are the agency chosen by Congress to enforce the penalties for refusing to obey the law. That a registrant threatens to violate the law does not warrant the board also to violate the law. It is axiomatic that two wrongs do not make a right. The board is not permitted to violate the law because of a threat to defy a civilian work order. When it violates the law for this reason the courts must enforce the law against the board and put it back in its place of making lawful classifications, not unlawful ones because of the threats of the registrant.

Another reason the holding of the court below is not in point is that the directions from the Selective Service System prohibit the draft boards from denying the conscientious objector status on any grounds of waiver unless

the waiver is intelligently and deliberately made in writing. As long as the record shows indisputably that a registrant has made the claim lawfully and has not withdrawn the claim in writing it is beyond the authority of the boards to forfeit the claim for any reason except a denial based on facts showing the registrant not to be a conscientious objector. The only way the board can avoid properly classifying according to the undisputed evidence showing conscientious objections is to get a written waiver from the registrant.—See Local Board Memorandum No. 41, issued by National Headquarters of Selective Service System, November 30, 1951, as amended August 15, 1952.

The position here taken by petitioner as to the construction of the law in question is supported by the legislative history of the Act. In Senate Report No. 1268, 80th Congress, 2d Session, dated May 12, 1948, to accompany Senate Bill No. 2655, the committee stated, among other things:

> "Therefore, where a registrant who has been assigned to work of national importance purposefully fails to comply with the duties imposed upon him, provision is made for withdrawing the privilege, and assigning the registrant to noncombatant service in the armed forces. Provision also is made for benefits for persons who perform work of national importance, and who suffer disability or death while in the performance of duty."

The Conference Report on Selective Service Act of 1948, rejected this proposal. (See Report No. 2438, House of Representatives, 80th Congress, 2d Session, dated June 19, 1948, to accompany Senate Bill No. 2655.) That report stated, among other things:

> "The House amendment provided that conscientious objectors found to be opposed to participation in noncombatant service should be deferred from induction for service under the legisla-

> tion. [¶] The conference agreement adopts the provisions of the House amendment providing for the deferment from induction of those conscientious objectors who are found to be opposed to participation in noncombatant service."

Report by Armed Services Committee, House of Representatives, No. 535, 82nd Congress, 1st Session, dated May 31, 1951, to accompany Senate Bill No. 1, provided:

> "Persons who are found by local boards to be opposed to noncombatant service shall be ordered by their local boards, subject to regulations prescribed by the President, to perform civilian work contributing to the maintenance of the national health, safety, or interest for a period of 24 months. A conscientious objector's refusal to perform such work will subject him to the penalties of the Selective Service Act.
>
> "The House amendment merely deferred such persons. The Senate bill required such persons to be assigned to work of national importance under civilian direction.
>
> "The House managers objected to this portion of the Senate bill since it contemplated the establishment of national work camps. The language agreed to by the House and Senate conferees will permit the President to prescribe the types of employment to which conscientious objectors may be assigned, but such employment will not be performed through the establishment of, or assignment to, national work camps."

It is plain from the above reports of the Senate and House that Congress did not intend to authorize the local boards to take a person out of the conscientious objector status solely because he refused to do the work assigned. The obvious remedy and procedure prescribed by Congress is the prosecution of the conscientious objector properly

classified as liable for civilian service for refusal to do the work he is ordered to perform.

It may be argued that the classification by the draft boards is final even though erroneous. This is not exactly a full statement of the law. It is true so long as the registrant can show some contradiction or dispute in the administrative record. In the absence of such dispute of fact, it cannot be said that there is a question of fact involved. Since there is no question of fact involved, and the classification is contrary to the facts establishing eligibility for the classification claimed, there is no basis in fact and the draft boards are without jurisdiction.—*Estep* v. *United States,* 327 U. S. 114, 122-123 (1946); *Dickinson* v. *United States,* 346 U. S. 389, 394, 396-397; *Schuman* v. *United States,* 9th Cir., 1953, 208 F. 2d 801, 802, 804-805; *Jewell* v. *United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772; *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368, 369-370.

An attempted distinction of the "no basis in fact" rule is made between the case of a conscientious objector and a minister. (*United States* v. *Simmons,* 7th Cir., 1954, 213 F. 2d 901, 904-905; *White* v. *United States,* 9th Cir., 1954, — F. 2d —) It is said that determination of the conscientious objector status involves inquiring into mental processes of a registrant. Those courts say that when the local board has said what is going on in the registrant's mind, such conclusion is final and settles the matter. It cannot be reviewed in court, declare such courts.

There is not one word in the act or the regulations that gives the board or the courts the right so to speculate. They cannot say what goes on in the mind of a conscientious objector claiming such classification, as they cannot in the case of a minister claiming his exemption.

The act deals only with the objective: statements and declarations of the registrants. It does not mention or go into the subjective. Congress conferred no right to roam into the field of mind reading, as suggested by the Government. Congress confined the courts and the boards to deter-

mination of the conscientious objector status based only on the concrete and outward manifestations of the registrant.

The act deals with objection or opposition to service in the armed forces. Objection is something objective. It is manifested by speech. It is something that can be determined as easily as any other fact. Does the registrant object to the point of refusing to do military service? If he does he is an objector. The inquiry is then specified by the act, dealing again with the concrete, not mind reading. The act says: Is his objection based upon religious training and belief? This is an element that does not involve the subjective. It deals with that which is manifest. It can be established the same as can the ministry claim. There is no broader room for speculation permitted by the act here because it deals with religious training and belief. The two concrete facts of opposition to service and religious training and belief make a *prima facie* case for classification as a conscientious objector under the statute.

By using the word "conscientiously" from the statute, the Government argues that it can apply its own arbitrary ideas as to what constitutes a conscientious objector. Use of the word does not allow the Government to write its own definition of what a conscientious objector is. The definition appears in the statute.

The use of the word "conscientiously" in the act that qualifies objection to training and service does not give the Government an illegal, vague and indefinite dragnet. The word is not a license to indulge in speculation. The word has no magic to it. It has an ordinary definition known to man. It is not a word that is confined to the esoteric or to clairvoyants. It cannot be used to take the board and the courts out of this world into the stratosphere of speculation. But the Government would have the Court soar up into it, contrary to law.

By the use of the word "conscientiously" Congress merely intended that if a man was a faker, feigning or falsely impersonating a conscientious objector the board could con-

clude that he was not "conscientiously" opposed. But surely by the use of the word "conscientiously" Congress did not intend to allow a board to speculate and defy the undisputed evidence showing that a person is an objector to training and service, based on religious training and belief. The use of the word "conscientiously" merely permits the draft board to do what the dissenting justices of the Supreme Court said in *Dickinson* v. *United States:*

> "The board must find and record affirmative evidence that he has misrepresented his case."—346 U. S. 389, 399.

Had Congress intended to give such claimed unlimited power to the boards in cases of conscientious objectors it would have said so. Surely it did not intend to allow the courts to interpret the word "conscientiously," used in the statute, to give a power to the boards over conscientious objectors that was not given to the boards in the case of other registrants.

If the Government is right on the interpretation it puts on the act then it will be impossible for a court ever to say that there is "no basis in fact" for the denial of the conscientious objector status. If the boards can, under a vague interpretation of "conscientiously," reject the evidence of one conscientious objector without any concrete, definite, disputing evidence in one case, then they can do it in all cases of conscientious objectors, regardless of the facts. Then all is ended. No longer will the "no basis in fact" rule mean anything to the conscientious objector. Through this sleight-of-hand process of argument the Government is attempting to amend the act. The Court should continue to stand by the proposition that conscientious objectors are to be given the same fair treatment under the act as all other classes of registrants are entitled to receive.

Respondent subjugates the power of this Court to that of the appeal board. It may be said that the Court is with

nothing but the cold record before it. Add the contention that the Court is not in a good position to rule on a question that involves the examination of the state of mind of a defendant. However, the appeal board that made the final classification in this case, petitioner submits, is in no better position than this Court. All that the appeal board had was the cold record before it. That is no more than this Court has. What superior powers do the men on the appeal board have over the judges on this Court in interpreting the law and applying it to the cold record? None. The power is with this Court to correct the gentlemen on the appeal board.

The suggestion was made in the court below that an inference can be drawn, particularly after looking at the registrant himself, that this registrant is not sincere and religious. This should be rejected. (*White* v. *United States*, 9th Cir., Sept. 14, 1954, — F. 2d —) The appeal board did not see the registrant. It had no chance to exercise the right claimed by the Government. It did not give any reasons why it rejected the claim. It is pure speculation for the respondent to suggest that this was the reason for the denial of the conscientious objector status. (*Dickinson* v. *United States*, 346 U. S. 389, 396-397) It must affirmatively appear from proof in the file. The respondent shows that it is relying entirely on speculation. This is not permitted in cases of this kind.

There is no basis in fact for the classification in this case, because there are no facts that contradict the documentary proof submitted by petitioner. The facts established in his case show that he is a conscientious objector to combatant and noncombatant military service. The classification given is beyond the jurisdiction of the boards.

It is respectfully submitted that the denial of the conscientious objector claim by the appeal board is without basis in fact, arbitrary and capricious.

TWO

The act and the regulations do not permit the Department of Justice to recommend to the appeal board that willingness of petitioner to defend himself and his brothers is basis in fact for the denial of the conscientious objector status.

The Assistant Attorney General recommended to the appeal board that Sicurella was not a conscientious objector because he believed in self-defense. [R. 101] This recommendation was illegal. There is nothing in the act or the regulations that prevents a person who is willing to defend his own life from claiming objection to participation in combatant and noncombatant military service. A person might defend his life and still have conscientious objections to being a soldier.

In his recommendation the Assistant Attorney General said that because Sicurella is willing to defend himself, his family and others of Jehovah's Witnesses he is not a conscientious objector. This is an artificial and unauthorized ground for the denial of the conscientious objector status, invented by the Assistant Attorney General in his recommendation. He attempted to amend the act and regulations and read into them things that are not there. The law cannot thus be watered down by writing into it provisions that do not appear in it. This type of amendment of the law is contrary to the concept of government. Neither the administrators nor the court can add to or take away from the words of Congress, expressed in the act. Even the President in the promulgation of the regulations did not incorporate these specious arguments and grounds into the definition of a conscientious objector. If the draft boards, the hearing officers and others are to write the qualifications of a conscientious objector according to their whims and discretion, then the rights of the registrant will be made valueless and insecure. The law will be done away with.

It is not necessary for a conscientious objector to be willing to commit suicide in order to come under the def-

inition of a conscientious objector. A man can even be classified as a conscientious objector in Class I-A-O and be allowed to perform military service without bearing a gun, providing he is willing to do hospital work or similar noncombatant service. Remember such a man is still a conscientious objector! If followed to its logical conclusion the argument of the Assistant Attorney General would authorize the forfeiture of the I-A-O classification to a conscientious objector. Congress did not intend this. If a man can be a conscientious objector and work in a hospital in an army, then why the difference here? Certainly a man can defend himself and at the same time claim conscientious objection to both combatant and noncombatant military service.

The only conceivable basis for the denial of the full conscientious objector status is that Sicurella stated that he was willing to defend himself. Certainly the exercise of the right of self-defense does not carry with it the agreement that the person willing to defend himself has no conscientious objections to going into the armed forces.

Congress did not intend to forfeit the conscientious objector status to those that are willing to defend themselves. This is proved by the provision for the I-A-O classification. This classification is for the conscientious objector who is willing to do noncombatant service in the armed forces. If willingness to do this type of service does not forfeit the conscientious objector status, then by force of the same reason willingness of the conscientious objector to defend himself with his own hands when attacked does not impeach his good faith. The pivotal factor in determining the conscientious objector status is whether the registrant objects to military service on account of religious training and belief and not whether he objects to self-defense. If the facts show that he has conscientious objections to both combatant and noncombatant military service, then he is entitled to the conscientious objector status regardless of his lack of objections to self-defense. Willingness to defend oneself is im-

material and irrelevant to the issues involved in the case.

If Congress intended to forfeit a man's rights as a conscientious objector because he would defend himself in case of assault upon his person, then certainly Congress would have made this an element of the conscientious objector status. Congress explicitly stated that objections to military service could not be based on political and philosophical bases. Congress could very well have stated that a man could not be a conscientious objector if he was willing to fight in self-defense. From the dawn of history of mankind it has been the prerogative of an individual to defend himself. Self-defense has been said to be the first law of nature. It is the law of God. Self-defense is inherent in the nature of man. Congress knew this characteristic of man when it passed the law. Had Congress intended to eliminate a person who was willing to defend his own life from the status of conscientious objector, it would have plainly said so.

The law grants the conscientious objector status to one who has objections to participation in both combatant and noncombatant military service in the armed forces because his belief arises out of obligations to the Supreme Being that are superior to those to the state. Congress did not say that the status was granted only to persons who were extreme pacifists. Taking Congress at its own words, it cannot be contended by anyone, whether he be a draft board member, judge or prosecutor, that it is necessary to submit willingly to destruction of one's own life in order to be a conscientious objector to military service. Such interpretation contended for is unreasonable. It pulls the teeth out of the provisions protecting conscientious objectors. Unless and until Congress explicitly states that one who is willing to defend himself is not a conscientious objector, then it is beyond the prerogative of the Government or the courts to read into the law something that Congress did not say.

A man can be a conscientious objector under the act and still be willing to fight in defense of his life, his loved ones and his home. A man can be a very sincere conscientious objector to service in the armed forces, combatant or noncombatant, and still be willing to fight to defend his own life. It is virtually impossible for a man to be a conscientious objector if the law is given the interpretation that has been contended for in this case. Almost every person, even if a coward, a poltroon or extreme pacifist, when put to the test will, as a last resort, fight to defend himself. Since it is the 'first law of nature,' which almost every man will exercise when placed in the position where it is necessary, it is unreasonable to suggest that Congress intended to defeat, by this sophisticated type of reasoning, the very purpose of the exemption.

Congress had in mind exempting people who had conscientious objections to service in the armed forces. Congress did not say that the exemption extended only to persons who had objections to participation in service in the armed forces and also objections to the use of force in self-defense. Since the willingness to fight in self-defense was not incorporated into the act and regulations as a basis for the denial of the conscientious objector status, it is absolutely unreasonable to hold that a man cannot be a conscientious objector unless he also objects to the use of force under every circumstance, including self-defense.

A Christian who is one of Jehovah's Witnesses, as is petitioner, is authorized by the law of God to defend his own life. In order to protect himself and his life he may use force to such extent as appears reasonably necessary. If required to repel and quell a bodily attack upon himself and his brothers, he may use force to the extent of killing.

This is authorized by the law of the land. A Christian need not always retreat before defending against an agressor. Sometimes retreat under the circumstances would be more dangerous than to stand one's ground and fight. This

was the position taken by the petitioner and explained to his local board and hearing officer.

The recommendation of the Assistant Attorney General, that petitioner be denied his conscientious objector status because of his willingness to defend himself, apparently has been impeached and abandoned as erroneous. Counsel for the appellant in the trial court in *Clark* v. *United States,* No. 14,176, pending in the United States Court of Appeals for the Ninth Circuit, read from a letter from the Department of Justice appearing in the file of Donald E. Kellar, one of Jehovah's Witnesses, registered with Local Board No. 85, Los Angeles County, California, a recommendation from Oscar Smith, the same Assistant Attorney General that wrote the letter of recommendation to the appeal board in his case. In that case Mr. Smith stated to the appeal board:

> ". . . his good faith and the acceptance of the principle of self-defense is not incompatible with opposition to participation in war in any form. In view of his fine reputation and manifest sincerity, it is determined that registrant is a true conscientious objector by reason of religious training and belief entitled to I-O status."—See the record in *Clark* v. *United States,* No. 14,176, Ninth Circuit, at pages 65-66.

In the case of *Hinkle* v. *United States,* No. 14,163 on the docket of the Court of Appeals for the Ninth Circuit, it appears that the same Assistant Attorney General made a recommendation to the appeal board. (See the record in that case at pages F. 43-44.) The recommendation of the Assistant Attorney General was contrary to the position taken by the court below. There the Assistant Attorney General stated:

> ". . . a belief that killing is justified in self defense does not refute a claim of conscientious objection."

The position taken by the Department of Justice here is also inconsistent with that taken by it before the appeal board for California in *Pitts* v. *United States,* No. 14,164, filed in the Court of Appeals for the Ninth Circuit. There T. Oscar Smith, in a letter to the chairman of the appeal board, on March 11, 1953, said:

> "The hearing officer reviewed the Federal Bureau of Investigation report which established bona fide church membership and a reputation for sincerity. Registrant personally appeared with three witnesses. He told the Hearing Officer that he would defend himself against an assailant even if the attacker were a soldier in a foreign army, but under no circumstances would he serve in the armed forces. The Hearing Officer believed registrant had a deep devotion to his religious faith, but he felt that willingness to kill a soldier in another army in self defense was participation in defensive warfare. He, therefore, concluded that registrant was not entitled to classification as a conscientious objector.
>
> "From all the evidence available it does not appear that registrant is disposed to defend the nation under any conceivable circumstances. His acceptance of the principle of self defense would not seem to embrace a belief in war because the attacker is wearing a uniform. Therefore, registrant's position is not inconsistent with opposition to participation in 'war in any form' as that term is used in the Universal Military Training and Service Act.
>
> "After consideration of the entire file and record, the Department of Justice finds that the registrant's objections are sustained as to both combatant and noncombatant training and service. It is, therefore, recommended to your Board that the registrant be classified in Class I-O."

The Department of Justice has now definitely rejected the thought and argument that a registrant cannot be a conscientious objector if he believes in self-defense.

Before concluding the discussion on this phase of the case it is important to call to the attention of the Court what the Acting Solicitor General said in his petition for writ of certiorari in *Taffs* v. *United States,* No. 576, October Term, 1953, at page 11:

> "We do not here seek review of the holding of the court below that the expressed willingness of the registrant and other Jehovah's Witnesses to use force, even to the extent of killing, in self-defense or in defense of home, family, or associates, does not of itself exclude them from the classification of conscientious objectors. The Department of Justice in its instructions to hearing officers for conscientious objector cases has taken the same position. See Appendix B, *infra,* pp. 20-24. See *Annett* v. *United States,* 205 F. 2d 689 (C. A. 10). Nor do we seek review of the determination that this particular registrant was sincere in the beliefs expressed by him and a *bona fide* member of Jehovah's Witnesses."

The change of view by the Department of Justice on this point (that self-defense may forfeit one's right to classification as a conscientious objector) is apparently the result of the decision by the Court of Appeals for the Tenth Circuit in *Annett* v. *United States,* 10th Cir., 1953, 205 F. 2d 689, 691-692. This decision, holding that belief in self-defense is no basis for the denial of the conscientious objector status, has been followed in *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329, 331; and *United States* v. *Hartman,* 2d Cir., 1954, 209 F. 2d 366, 369-370. The Court of Appeals for the Ninth Circuit has also recently adopted this view in *Hinkle* v. *United States,* No. 14,163, decided September 24, 1954. There the court said:

> "We do not think that Congress in using the words 'participation in war in any form' contemplated the sort of self defense of an individual or his family or the theocratic warfare described in the Bible as coming within the meaning of that phrase."

The Government is making application for writ of certiorari in the *Hinkle* case.

See what Mr. Justice Douglas stated in *Clark* v. *United States*, 74 S. Ct. 357, 98 L. Ed. 171:

> "Moreover the claim of appellant that he should have been classified as a conscientious objector and the decision of the District Court against him shape up an issue that may turn on whether *Annett* v. *United States*, 205 F. 2d 689, represents the law. In that case the Court of Appeals for the Tenth Circuit held, on facts closely analogous to these, that there was no basis in fact for denial of a conscientious objector classification. The *Annett* decision has recently been followed by the Courts of Appeal for the Second and Eighth Circuits. *United States* v. *Pekarski*, 207 F. 2d 930 (C. A. 2d Cir.), decided October 23, 1953; *Taffs* v. *United States*, 208 F. 2d 329 (C. A. 8th Cir.), decided December 7, 1953."

The holding of the court below, giving freedom to the Assistant Attorney General and the appeal board to find against petitioner on grounds outside the law, conflicts with *Reel* v. *Badt*, 2d Cir., 1944, 141 F. 2d 845, where the court said (p. 847):

> "In other words, he reached a conclusion as a matter of law which was directly opposed to our decision in *United States* v. *Kauten*, 2 Cir., 133 F. 2d 703."

See also *Phillips* v. *Downer*, 2d Cir., 1943, 135 F. 2d 521, 525-526.

It is submitted that it is unnecessary for petitioner to satisfy the Court that the Government is wrong or that the Department of Justice and the appeal board were in error in relying upon the self-defense belief of the petitioner to deny the conscientious objector status. It is sufficient that petitioner satisfy the Court that there has been error committed in the draft board proceedings by the reliance upon this ground by the appeal board and the Department of Justice. Since the appeal board and the Department of Justice relied upon this ground, a showing by the petitioner that the ground is error is adequate and sufficient to constitute a ground for reversal. In *Reel* v. *Badt*, 2d Cir., 1944, 141 F. 2d 845, the Court of Appeals reversed the case and remanded the file to the Selective Service System for reprocessing, because of ambiguity and doubt in the draft board record.—See also *United States* v. *Alvies*, N. D. Cal., 1953, 112 F. Supp. 618, 624.

This contention is similar to the contention that is ordinarily made in this Court when cases come to it from state courts. Where an error is committed in the charge to the jury and more than one offense is involved and the judgment is based on all charges or all counts, this Court will invariably reverse the case when one count or point is shown to be in error.—*Whitney* v. *California*, 274 U. S. 357, 363-369; see also *Terminiello* v. *Chicago*, 337 U. S. 1.

It is apparent that the conclusion reached by the hearing officer, after finding as a fact petitioner to be a conscientious objector, was arbitrary and capricious, because the basis for the rejection of petitioner's evidence was on illegal and irrelevant grounds.—*Linan* v. *United States*, 9th Cir., 1953, 202 F. 2d 693; *Hinkle* v. *United States*, 9th Cir., Sept. 24, 1954, — F. 2d —.

The report of the hearing officer was adopted by the Department of Justice and forwarded to the appeal board with a recommendation that it be followed. While the recommendation was only advisory, it was accepted and acted upon by the appeal board. The appeal board concurred in

the conclusion reached by the hearing officer. It classified petitioner I-A and denied his conscientious objector status. This action of the appeal board prevents the advisory recommendation of the Department of Justice from being harmless error.—See *United States* v. *Everngam*, D. W. Va., 1951, 102 F. Supp. 128, 131; *Hinkle* v. *United States*, 9th Cir., Sept. 24, 1954, — F. 2d —.

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board becomes a link in the chain. Since it is one of the links of the chain its strength must be tested. (*United States* v. *Romano*, S. D. N. Y., 1952, 103 F. Supp. 597.) The absence of the FBI report from the record and the withholding of it from the registrant at the hearing produce a break in the link and make the entire Selective Service chain useless, void and of no force and effect. This Court held in *Kessler* v. *Strecker*, 307 U. S. 22, that if one of the elements is lacking the "proceeding is void and must be set aside." (307 U. S., at page 34) The acceptance of the recommendation of the Department of Justice that has been made up without producing the FBI report to the registrant in the proper time and manner makes the proceedings illegal, notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *United States* v. *Everngam*, D. W. V., 1951, 102 F. Supp. 128, at pages 130, 131.—See also *United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395; cf. *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329; *Hinkle* v. *United States*, 9th Cir., Sept. 24, 1954, — F. 2d —.

The construction that has been placed upon the act by the Department of Justice in this case and by the court

below is unreasonable. It works a forefeiture against a large segment of religion in the United States. The interpretation of the act would deny to 150,000 of Jehovah's Witnesses entirely the protection of the law. This would be notorious discrimination of the worst sort.

A reasonable interpretation of the statute by this Court is due, indulging all reasonable doubts concerning the meaning of the act in favor of the rights of one indicted thereunder. (*Harrison* v. *Vose,* 50 U. S. 372, 378) It has been said that a sensible construction should be placed on an act, so as to avoid oppression, absurd consequences or flagrant injustice. It will be presumed that Congress intended to avoid results of such character. (*United States* v. *Kirby,* 7 Wall. (74 U. S.) 482, 486-487; *United States* v. *American Trucking Ass'ns,* 310 U. S. 534) Where a statute is susceptible to two constructions "by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (*United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 408) The argument of the Government and of the court below requires this Court to place an unreasonable construction upon the act. Additionally it raises "a succession of constitutional doubts" as to such interpretation.—*Harriman* v. *Interstate Commerce Comm'n,* 211 U. S. 407, 422.

The interpretation of the Department of Justice is narrow, unreasonable and discriminatory. It undermines the intent of Congress. It flouts the history of fair treatment of conscientious objectors. It twists the words of the law for the purpose of illegally pulling an unpopular religion outside the protection of the law. Congress did not intend any such un-American and unscriptural discrimination. It frames mischief by unequal protection of law, condemned by the law of God and of man.—Psalm 94:20; *Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329.

It is respectfully submitted that the recommendation by the hearing officer and the Department of Justice to the appeal board is illegal, arbitrary and capricious, and

jaundiced and destroyed the appeal board classification upon which the order to report was based.

CONCLUSION

It is respectfully submitted that this Court should find that there is no basis in fact for the denial of the conscientious objector status by the appeal board. This Court should also conclude that the act and the regulations did not authorize the Department of Justice to recommend to the appeal board that self-defense is basis in fact for the denial of the conscientious objector status. The judgment of the court below should be reversed and the cause should be remanded to the district court with directions to enter a judgment of acquittal.

Respectfully submitted,

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